U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0365 BLA

THEODORE FLOYD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	DATE ISSUED: 06/22/2015
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Theodore Floyd, Delbarton, West Virginia, pro se.

Paul E. Frampton and Thomas M. Hancock (Bowles, Rice, McDavid, Graff & Love LLP), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2012-BLA-5150) of Administrative Law Judge Drew A. Swank rendered on a subsequent claim[1] filed on July 21, 2010, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act). The administrative law

[1] Claimant filed eight previous claims for benefits on May 31, 1989, October 4, 1991, March 26, 1993, September 15, 1994, March 13, 1996, June 23, 1997, September 29, 1998, and August 14, 2001. Director's Exhibits 1-8. All of the prior claims were denied by the district director. *Id.* Claimant requested modification of his initial claim

judge noted the parties' stipulation of 40.30 years of underground coal mine employment and considered entitlement under 20 C.F.R. Part 718. The administrative law judge determined, based on the newly submitted evidence, that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b) and, therefore, also established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. However, the administrative law judge found that claimant did not prove total disability, an essential element of entitlement, under 20 C.F.R. §718.204(b)(2), and thus failed to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] Accordingly, the administrative law judge denied benefits.

Claimant generally appeals the denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law.[3] 33 U.S.C. §921(b)(3),

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on June 27, 1990, which was denied by the district director on August 24, 1990. Director's Exhibit 1. Claimant also requested a hearing following the denial of his fourth claim on March 6, 1995, but withdrew his request on April 5, 1995. Director's Exhibit 4. There is no indication in the record that claimant took any further action with regard to the denials of his prior claims. Director's Exhibits 2, 3, 5-8. Claimant's most recent prior claim, filed on August 14, 2001, was denied by the district director on June 27, 2003, because he did not establish any element of entitlement. Director's Exhibit 8.

[2] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she worked at least fifteen years in underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 11. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). In this case, because claimant's prior claim was denied for failure to establish any element of entitlement, claimant had to establish one element, based on the newly submitted evidence, in order to obtain review of the case on the merits. 20 C.F.R. §725.309(d)(2), (3); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

The regulations provide that a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work, and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C of 20 C.F.R. Part 718; 3) the miner has pneumoconiosis and is shown by the evidence to suffer from cor pulmonale with right-sided congestive heart failure; or 4) a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling.[4] 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered pulmonary function studies dated August 27, 2010, June 1, 2011, and January 7, 2012. Decision and Order at 17; Director's Exhibits 19, 40; Claimant's Exhibit 1. Claimant's height was twice recorded as 66 inches for the studies dated August 27, 2010 and January 7, 2012, and once recorded as 64 inches for the June 1, 2011 study. Director's Exhibits 19, 40; Claimant's Exhibit 1. Referring to the discrepancy in the measurements of claimant's height, the administrative law judge asserted, with citations to two medical journal articles, that a person's height decreases with age and can vary on a daily basis by over .60 inches "depending on the time of day due to effects of exertion and gravity."

[4] The administrative law judge found correctly that claimant is unable to establish entitlement to benefits, based on invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, as none of the physicians who provided biopsy reports, or interpretations of chest x-rays and CT scans, indicated that there was evidence of complicated pneumoconiosis. Decision and Order at 11-14; Director's Exhibits 20, 38, 39; Claimant's Exhibits 1, 4, 5, 8; Employer's Exhibit 1, 4-7.

Decision and Order at 16 n.15. Based on this information, the administrative law judge determined:

> It is completely understandable, therefore, that different height measurements were recorded for the miner as they were made not only over a period of time, but at different times of day as well. In the present case, neither party has objected to any of the recorded heights contained in the pulmonary function test reports. Absent contrary evidence, there is no reason to doubt the accuracy of the various measurements even though they vary.

Id.

The administrative law judge also reported, however, that Board precedent did not permit him to use the recorded heights, but rather "requires the administrative law judge to *sua sponte* alter the unimpeached evidence of record in this matter and not accept the measurements as observed by the medical providers." Decision and Order at 16 n.15 *citing Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983) ("[i]f there are substantial differences in the recorded heights among all the studies, the administrative law judge must make a factual finding to determine claimant's actual height."). The administrative law judge interpreted the Board case law as follows:

> Evidently the Board is willing to accept precise data from physicians regarding the miner's pulmonary function and other data, but not the physician's measurement of the miner's height on a given day and time if there are "substantial differences" – a factor the Board left undefined. In compliance with the Board's requirement to "determine [the] claimant's actual height," the undersigned will adopt the shortest measurement [claimant] provided in the admitted pulmonary function studies. The rationale for this approach is simple; if all of the physician's measurements are presumed to be incorrect (and therefore the administrative law judge is to substitute a measurement in their place as required by the Board), averaging those incorrect measurements would simply produce – absent mere random chance – an incorrect measurement as well. By adopting the shortest measurement of many possible ones, logically the miner is *at least* as tall as the shortest, and if even the shortest is incorrectly not short enough, it would be the *closest* to the miner's real height compared to the other incorrect, taller possible choices."

Decision and Order at 16-17 n.15.

The administrative law judge next determined that when the miner's shortest height of 64 inches is used, "the closest greater height to that value" in the tables at Appendix B must be applied, which is 64.2 inches. Decision and Order at 17. Relying on the values applicable for a miner who is 71 years old and 64.2 inches tall, the administrative law judge found that only Dr. Zaldivar's pre-bronchodilator study on June 1, 2011 was qualifying for total disability.[5] *Id.* at 17; *see* Director's Exhibit 40. The administrative law judge concluded that claimant failed to establish total disability at 20 C.F.R. 718.204(b)(2)(i), as the preponderance of the pulmonary function study evidence, "including the most recent pre[-] and post-bronchodilator test," was nonqualifying. Decision and Order at 18.

The administrative law judge made clear his disagreement with the Board's holding in *Protopappas. See Protopappas,* 6 BLR at 1-223. However, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, also specifically requires an administrative law judge to determine a miner's "correct height" in order to properly evaluate whether pulmonary function studies are qualifying for total disability under the regulations. *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 114, 19 BLR 2-70, 2-81 (4th Cir. 1995); *see also Poole v. Freeman United Coal Min. Co.*, 897 F.3d 888 (7th Cir. 1990). Although the administrative law judge has discretion to render factual findings, his determination of an actual or "correct height" must be rational and supported by substantial evidence. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). We vacate the administrative law judge's finding that the miner's actual height was 64 inches because his rationale is flawed.

The administrative law judge first erred in failing to adequately explain how the medical literature he cited is applicable to the facts of this case. Although the administrative law judge observed that a person's height can vary by over .60 inches

[5] Total disability may be established based on pulmonary function tests showing a FEV1 value that is equal to or less than those listed in Table B1 (Males), Appendix B, 20 C.F.R. Part 718, "for an individual of the miner's age, sex, and height," if such tests also show either an FVC or MVV value that is equal to or less than those listed in the table "for an individual of the miner's age, sex, and height." *See* 20 C.F.R. §718.204(b)(2)(i). The maximum age for which qualifying values are reported in Appendix B is 71 years. In this case, claimant was 86-87 years old when his pulmonary function tests were conducted. Claimant's pulmonary function testing did not include a MVV value. Applying the maximum age of 71 and 64.2 inches in height, a pulmonary function test is considered "qualifying" for total disability if the FEV1 value is 1.41 or below, and the FVC value is 1.85 or below. Applying the maximum age of 71 and 66 inches in height, a pulmonary function test is qualifying with an FEV1 value of 1.57 or below and an FVC of 2.04.

daily, and that a person's height decreases with age, the evidence in this case does not conform to that proposition. Claimant's height did not decline with age, as it was measured as 66 inches in 2010, 64 inches in 2011, and 66 inches in 2012. Director's Exhibits 19, 40; Claimant's Exhibit 1. The difference between the heights reported for claimant was also 2 inches, which is more than three times the variance of .60 inches referenced by the administrative law judge. *Id*.

We also disagree with the administrative law judge's rationale that "logically the miner is *at least* as tall as the shortest [recorded height], and if even the shortest is incorrectly not short enough, it would be the *closest* to the miner's real height . . . ." Decision and Order at 16-17 n.15. While it is true that a miner who is 66 inches tall is also at least 64 inches tall, it does not necessarily follow that the miner's correct height is 64 inches tall.

Most critically, the administrative law judge's finding as it relates to claimant's actual height is based on an incorrect interpretation of this Board's holding in *Protopappas*. The administrative law judge explained his rationale as follows: "if all of the physician's measurements are presumed to be incorrect (and therefore the administrative law judge is to substitute a measurement in their place as required by the Board), averaging those incorrect measurements would simply produce – absent mere random chance – an incorrect measurement as well." Decision and Order at 16 n.15. Contrary to the administrative law judge's analysis, the Board's holding in *Protopappas* does *not* presume that all of the physicians' measurements are incorrect. Instead, it requires that "[i]f there are substantial differences in the recorded heights among all the studies, the administrative law judge must make a factual finding to determine claimant's actual height." *See Protopappas*, 6 BLR at 1-223. Thus, while the Board has upheld administrative law judges' decisions to calculate a miner's average height, as a reasonable method to resolve substantial differences between recorded heights, *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008); *Krise v. Kocher Coal Co.*, BRB No. 11-0250 BLA (Dec. 21, 2011) (unpub.); the Board has also upheld administrative law judges' decisions to choose one of the recorded heights as the actual height, where the administrative law judge provided an adequate rationale for doing so, *see Jent v. Cumberland River Coal Co.*, BRB No. 06-0814 BLA (July 31, 2007) (unpub.); *Yonce v. CSX Transportation*, BRB No. 98-1132 BLA (Nov. 17, 2004) (unpub.).

We are unable to affirm the administrative law judge's logic or his bright-line-rule that discrepancies in reported heights must be resolved by selecting the shortest measurement. In addition to our conclusion that the administrative law judge's logic is unsound, a general rule that categorically relies on the shortest height measurement will automatically disadvantage a miner. In the tables of values set forth in Appendix B to Part 718, as the miner's height decreases, the qualifying values for the FEV1, FVC and MVV also decrease. Thus, pulmonary function study values that would be qualifying at a

greater height would be nonqualifying at a lower height.[6] In the absence of a valid rationale for finding that claimant's actual height is 64 inches, the lowest measurement recorded, we vacate the administrative law judge's finding that the pulmonary function study evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i).[7]

On remand, in determining claimant's actual height, the administrative law judge must set forth a rationale that conforms to the facts of this case, and explain his findings of fact and conclusions of law, in accordance with the Administrative Procedure Act (APA).[8] In determining the weight to accord the conflicting pulmonary function studies, the administrative law judge may distinguish between qualifying pre-bronchodilator and non-qualifying post-bronchodilator results. The Department of Labor has cautioned against reliance on post-bronchodilator results in determining total disability, stating that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence or absence of pneumoconiosis." 45 Fed. Reg. 13,682 (Feb. 29, 1980).

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[6] In the present case, the pre- and post-bronchodilator values of the most recent pulmonary function test, by Dr. Splan on January 7, 2012, are non-qualifying at the height of 64.2 inches. However the pre-bronchodilator values are qualifying for total disability, applying the height of 66 inches as recorded by Dr. Splan, and also based on an average height of 65.3 inches.

[7] Employer argues that the administrative law judge did not properly address Dr. Rosenberg's testimony that claimant's pulmonary function study results are normal for his age. Employer's Response Brief at 14. The Board has held that pulmonary function studies performed on a miner who is over the age of 71, the maximum age for which qualifying values are reported in Appendix B to Part 718, must be treated as qualifying if the values produced by the miner would be qualifying for a 71 year old. *K.J.M.* [*Meade*] *v. Clinchfield Coal Co.*, 24 BLR 1-40, 1-47 (2008). In the case of a miner older than 71 years, the party opposing entitlement may offer medical evidence to prove that pulmonary function studies that yield qualifying values for age 71 are actually normal or otherwise do not represent a totally disabling pulmonary impairment. *Id*. at 1-47. On remand, the administrative law judge may address the validity of Dr. Rosenberg's rationale for asserting that claimant demonstrated normal pulmonary function, and the weight, if any, to accord his opinion.

[8] The Administrative Procedure Act, 5 U.S.C. §500 *et seq*., as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented." 5 U.S.C. §557(c)(3)(A).

With respect to 20 C.F.R. §718.204(b)(2)(ii), we affirm the administrative law judge's finding that claimant is unable to establish total disability based on the blood gas study evidence, as none of the studies, dated October 27, 2010, June 1, 2011, and January 7, 2012, was qualifying. Decision and Order at 18; Director's Exhibits 19, 40; Claimant's Exhibit 1. Further, the administrative law judge indicated correctly that, based on the lack of evidence of cor pulmonale with right-sided congestive heart failure, claimant is unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 18.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially indicated that he was required to compare the exertional requirements of claimant's usual coal mine employment to the physicians' assessments of claimant's physical limitations. Decision and Order at 20. The administrative law judge then considered the medical opinions of Drs. Ammisetty, Splan, Zaldivar and Rosenberg. The administrative law judge gave "little weight" to the opinions of Drs. Ammisetty and Splan, who concluded that claimant suffers from a totally disabling pulmonary impairment. *Id*. at 22; Director's Exhibit 19; Claimant's Exhibit 1. The administrative law judge found their opinions unpersuasive because "the pulmonary function test and arterial blood gas study that each performed in conjunction with their own examination of the miner, [was] without reference to the additional objective tests of record, all of which are non-qualifying with the exception of one pre-bronchodilator [pulmonary function test]."[9] Decision and Order at 22. The administrative law judge gave "little weight" to Dr. Zaldivar's opinion on the ground that it was inconsistent, and unclear "as to the precise nature of [c]laimant's impairment."[10] *Id*. In contrast, the administrative law judge accorded great weight to Dr.

[9] Dr. Ammisetty examined claimant on September 22, 2010, at the request of the Department of Labor, and reported that claimant last worked as a "boss." Director's Exhibit 19. He further stated that claimant "has significant pulmonary impairment" and "could not work in the same work environment that needs high physical demand." *Id*. In support of his opinion, Dr. Ammisetty described claimant's PO2 of 72 as being "below the normal range," and indicated that claimant demonstrated "significant hyperventilation" and "respiratory acidosis" during his blood gas study. *Id*. Dr. Splan examined claimant on January 7, 2012, and reported that claimant worked underground in a variety of jobs, including roof bolter, shuttle car operator, joy loader and continuous miner operator. Claimant's Exhibit 1. Dr. Splan stated, "[i]mpairment of [claimant's] pulmonary status is thought to be moderately severe based upon his ventilator status with an FEV-1 of equal to or less than 60% of predicted[;] he should not return to the mines." Claimant's Exhibit 1.

[10] The administrative law judge observed that Dr. Zaldivar first stated in his report that claimant could perform his previous coal mine employment, if he received intensive treatment for his asthma, but later testified during a deposition that claimant "is probably

Rosenberg's opinion, that claimant does not have a totally disabling respiratory or pulmonary impairment, stating that "Dr. Rosenberg specifically points out that the vast majority of the pulmonary function tests and all of the arterial blood gas tests yielded non-qualifying values."[11] *Id.*; Employer's Exhibits 3, 9. Thus, the administrative law judge found that the medical opinion evidence did not establish total disability under 20 C.F.R. §718.204(b)(2)(iv).

Because the administrative law judge's improper assessment of the pulmonary function study evidence affected the weight he accorded the conflicting medical opinions, we vacate his findings at 20 C.F.R. §718.204(b)(2)(iv). In the interest of judicial economy, we will also address his credibility determinations with respect to Drs. Ammisetty, Splan and Rosenberg.

The administrative law judge observed that Drs. Ammisetty and Splan "rely only upon the pulmonary function test and arterial blood gas study that each performed in conjunction with their own examination without reference to the additional objective tests of record, all of which are non-qualifying." Decision and Order on 22. On remand, because a preponderance of the pre-bronchodilator pulmonary function study evidence may be *qualifying* for total disability, dependent on the administrative law judge's finding as to claimant's actual height, the administrative law judge should reconsider whether the opinions of Drs. Ammisetty and Splan are reasoned and supported by the objective evidence of record, taking into account his determination as to the pulmonary function tests.

Furthermore, contrary to the administrative law judge's analysis, a physician may offer a reasoned medical opinion diagnosing total disability, even though the objective studies underlying his or her report are non-qualifying for total disability. The regulations provide that a miner may establish total disability with reasoned medical opinion evidence, even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107,

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more impaired than a healthy 87-year-old male, so I don't expect that he would be able to work in the coal mines." Decision and Order at 22, *quoting* Employer's Exhibit 8 at 34.

[11] Dr. Rosenberg reviewed the reports of Drs. Ammisetty, Splan and Zaldivar, and several x-ray and CT scan readings, and noted that claimant last worked as a "boss." Employer's Exhibit 3. He opined that "from an impairment perspective, [claimant] has mild restriction, without significant obstruction after bronchodilators" and has "preserved oxygenation." *Id.* Dr. Rosenberg concluded that claimant "is not disabled from performing his previous coal mine job or similarly arduous types of labor." *Id.*

2-124 (6th Cir. 2000). Accordingly, we instruct the administrative law judge on remand to reweigh the opinions of Drs. Ammisetty and Splan and determine whether they establish, in accordance with the requirements of 20 C.F.R. §718.204(b)(2)(iv), that claimant is unable to perform the physical requirements of his usual coal mine work. *See Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991).

Finally, the administrative law judge credited Dr. Rosenberg's opinion, that claimant is not totally disabled, because he found it to be better supported by the non-qualifying objective tests. Dr. Rosenberg testified that "while [claimant] has had some reduction of his spirometic measurements, they are above qualifying levels." Employer's Exhibit 9 at 10. The administrative law judge failed to consider, however, that Dr. Rosenberg did not indicate the height and age he applied at Appendix B in determining that all the tests were non-qualifying. Employer's Exhibit 3 at 10. Dr. Rosenberg's statement is inconsistent with the administrative law judge's finding that Dr. Zaldivar's pre-bronchodilator values were qualifying.[12] Dr. Rosenberg also inaccurately cited the results of the pulmonary function study obtained by Dr. Ammisetty on August 27, 2010. He stated that this pulmonary function study produced a pre-bronchodilator FEV1 of 2.20, when the value was 1.60. Director's Exhibit 19; Employer's Exhibit 3. Based on these inconsistencies, we instruct the administrative law judge to further explain his credibility findings with respect to Dr. Rosenberg's opinion, taking into account the effect of his determination on remand as to claimant's actual height on the qualifying nature of the pulmonary function studies. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

On remand, the administrative law judge must reconsider whether the medical opinion evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv), taking into consideration the credibility of the physicians' explanations, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge must also make a finding as to whether each physician had an accurate understanding of the nature of claimant's usual coal mine job, in determining whether claimant is totally disabled. *See Lane*, 105 F.2d at 174, 21 BLR at 2-48. If the administrative law judge finds total disability established based on the pulmonary function studies at 20 C.F.R.

[12] Additionally, Dr. Splan's January 7, 2012 pre-bronchodilator pulmonary function test would be qualifying for total disability under the regulations, based on the height recorded by Dr. Splan of 66 inches using the maximum age set forth in the tables of 71.

§718.204(b)(2)(i) or the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), or under both subsections, the administrative law judge must further determine, based on his consideration of all the evidence, whether claimant satisfied his burden to establish a totally disabling respiratory or pulmonary impairment. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (en banc). If claimant fails to establish total disability, an essential element of entitlement, benefits are precluded. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). However, if the administrative law judge finds that claimant has a totally disabling respiratory or pulmonary impairment, claimant is entitled to invocation of the amended Section 411(c)(4) presumption. If claimant invokes the presumption, the administrative law judge must determine whether employer has established rebuttal by affirmatively proving that claimant does not have legal pneumoconiosis,[13] or by establishing that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201(a)(2). *See* 20 C.F.R. §718.305(d)(1)(A), (ii); *West Virginia CWP Fund v. Bender*, 782 F.3d 129 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). In reaching his findings on remand, the administrative law judge must comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[13] Because the administrative law judge determined that claimant established the existence of clinical pneumoconiosis by a preponderance of the evidence, employer is precluded from establishing rebuttal under 20 C.F.R. §718.305(d)(1)(i). However, if the presumption is found invoked, the administrative law judge must consider whether employer disproved the existence of legal pneumoconiosis, by showing that claimant's respiratory impairment is not significantly related to, or substantially aggravated by, coal dust exposure. This inquiry is necessary to provide a framework for assessing the second method of rebuttal: whether employer disproved disability causation by establishing that no part of claimant's total disability is due to pneumoconiosis as defined at 20 C.F.R. §718.201. *See* 20 C.F.R. §718.305(d)(1)(ii); *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA, slip op. at 11 (Apr. 21, 2015) (Boggs, J., concurring and dissenting).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge